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IN THE

Supreme Court of the United States

October Term, 1958

No. 739

ROBERT G. THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

On Application for Writ of Certiorari

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Respondent's cavalier treatment of the issues raised in the petition and the indifference with which it meets petitioner's arguments suggest an overconfidence in the outcome of this case which is neither warranted by the facts nor the gravity of the issues involved. It wholly ignores questions 7, 8 and 9, presented for review in the petition and fails to come to grips with the basic content of the remaining questions.* This reply is addressed to the questions discussed by respondent in the order in which they appear in respondent's brief.

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* It is characteristic of this indifference that respondent did not even take the trouble to ascertain all of the grounds of petitioner's motion under Section 2255. Respondent asserts in its brief in opposition that petitioner's contention that his sentence placed him in double jeopardy was not advanced in the Section 2255 motion but was first raised (in the current proceedings) on the appeal from the denial of the motion (Brief p. 15, note 10). This is not the fact. This ground was expressly raised in petitioner's motion of April 10, 1958 and is set forth in Paragraph F of that motion (Petition pp. 20-21).

1. Respondent in its brief in opposition seeks to reduce the issues raised by petitioner to the mere question of the sufficiency of the evidence and posits its argument as to the availability of the remedy on that limited view of the issues raised. But petitioner's motion under Section 2255 is grounded on a claim of a deprivation of fundamental procedural and substantive due process arising, in part, out of an erroneous and unconstitutional construction of the contempt statute (18 U. S. C. 401(3)) under which petitioner was convicted. In addition petitioner's motion is grounded on a claim of a deprivation of the specific constitutional guarantee against being twice punished for the same offense. Respondent's placing of the issues as merely a question of the sufficiency of the evidence may perhaps obscure the basic questions raised by petitioner as to the fundamental unfairness which taints his conviction and sentence, but it does not meet them.

We do not dispute that resolution of the basic issues requires an examination of the evidence on which petitioner's conviction and sentence rest. This is necessary because, while Judge Noonan relied on the authority of the court below in *United States* v. *Hall*, 198 F. 2d 726, which unequivocally affirmed that conviction on the theory of constructive notice (Petition pp. 29-31), he did not enunciate the theory on which he based the conviction. Hence, an examination of the evidence on which he acted is essential to confirm the basis on which the conviction rests.

Under the view adopted by four dissenting Justices of this Court in *Green* v. *United States*, 356 U. S. 165, the theory on which the conviction in this case rests resulted in a conviction on a charge not made. The majority of this Court in *Green supra*, did not reach at this question. If this question is decided in petitioner's favor then, under the applicable decisions of this Court, petitioner's right to relief under Section 2255 is plain. Moreover, the theory of constructive notice applied by Judge Noonan is based on

an erroneous construction of the contempt statute (Petition pp. 32-33; 35-36). Thus this case squarely raises the question of the availability of the remedy under Section 2255 to test a claim of error in statutory construction, the importance of which was noted by this Court in *Ladner* v. *United States*, 358 U. S. 169, 173.

The significance of *Sunal* v. *Large*, 332 U. S. 174, to the case at bar lies in the plain implication in that case that the circumstances under which the courts should exercise power to review a judgment in proceedings by way of collateral attack are broader in a case in which a defendant had pursued the appellate course and failed than in a case in which no attempt was made to pursue the appellate course. Thus, this Court plainly indicated that it would have granted relief to the petitioners in *Sunal* v. *Large*, had they pursued the appellate route and failed even though it held that the error complained of did not "infect the trial with lack of procedural due process" (at pp. 181-182).*

Respondent urges: "There is no occasion for further review of the factual question—limited in importance to this single case—by this Court in this collateral proceedings" (Brief p. 14). We contend that the issues involved are not limited in importance to this single case (Petition pp. 26-28). However, we also urge that matters of record of which respondent is fully cognizant are persuasive reasons for scrupulous concern that in this case there be no miscarriage of justice. Petitioner has already paid a higher price for his conduct in jumping bail than society could ever have exacted. For, while in Federal custody, in an institution to which he was brought for the purposes of awaiting trial on the contempt charge, he was the victim of a brutal and unprovoked assault with a lead pipe by an

* As we noted in the petition (footnote at p. 48) Mr. Justice Rutledge, in his dissenting opinion in *Sunal* so understands the basis of the majority holding in that case.

inmate in that institution. The attack, for which no possible explanation could be advanced except that petitioner was a communist, nearly cost him his life and caused permanent damage which is an ever-continuing source of hazard to his life (Tr. 355-61).*

Moreover this Court's decision in *Yates* v. *United States*, 354 U. S. 298, casts serious doubt on the validity of petitioner's conviction in the Smith Act case for which he served a sentence of three years.** He has already served approximately nineteen months of his sentence on the contempt conviction. Under these circumstances petitioner should not be precluded from relief because of a narrow and technical view of the scope of the remedy under Section 2255.

2. Respondent disposes of petitioner's contention that his conviction rests on a theory of constructive notice by its naked assertion that "the evidence is sufficient to sustain the finding by the trial court (Judge Noonan) that petitioner had actual knowledge of the existence of the surrender order of July 2, 1951" (Brief p. 13). But Judge Noonan made no finding of petitioner's *actual* knowledge. What Judge Noonan found is that "it has been established beyond a reasonable doubt that respondent had notice or knowledge of the order", and this finding was based on the theory that petitioner's knowledge of the prospective issu-

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* The assault fractured a portion of his skull which was replaced by a silver plate. He has since undergone two additional surgeries of the brain area because of a subsequent infection and is under a continuing hazard of repeated infections and the necessity of additional surgery (Tr. 355-61).

** This Court did not review the sufficiency of the evidence to sustain petitioner's Smith Act conviction. *Dennis* v. *United States*, 341 U. S. 494. The evidence there was substantially identical with the evidence in *Yates*, which this Court held pointed merely to the advocacy of abstract doctrine (*Yates*, *supra*, at pp. 329-30).

ance of the order charged him with knowledge that it was later made (Petition pp. 8-16).*

It is highly significant that the court below could not find support for its conclusion that the evidence was sufficient to establish actual knowledge in either the record, or opinion and rationale of the trial judge but was compelled to rely upon alleged facts *de hors* the record. It was solely by virtue of its reliance on judicial notice of alleged front page news which it improperly imputed to petitioner that the court below bridged the gap between the finding of constructive notice on which the trial judge predicated conviction and the finding by the court below of actual knowledge.

3. Respondent meets petitioner's contention that consideration by the court below of alleged facts *de hors* the record deprived him of his constitutional right to be confronted with the evidence and an opportunity to rebut it by treating this consideration as "a passing remark made by an *appellate* court, on *collateral* review of the evidence supporting a conviction made after its summarization of the evidence of record on which the trial judge based his verdict" (Brief p. 15). But the materiality of the alleged facts cannot be disclaimed by merely characterizing the court's consideration of them as a "passing remark". For

* Petitioner contends that the evidence on which Judge Noonan based his finding was insufficient to support even a finding of petitioner's knowledge of the prospective issuance of the order (Petition pp. 6-16, 36-38). One of the bases on which Judge Noonan relied to support a finding of such knowledge was the inference he drew that petitioner was with his co-defendants on June 29 when Mr. Sacher advised them to appear in court on July 2. Throughout the proceedings on direct review and the instant proceedings respondent maintained that the evidence was sufficient to support that inference. It now concedes doubt on that score. In its Statement in its brief in opposition respondent states that on June 29, 1951 Mr. Sacher "met all of the *Dennis* defendants *with the possible exception of petitioner* * * * and notified them that they would have to appear in court on Monday, July 2" (Brief p. 7, emphasis supplied).

they were plainly a vital link in the chain of inferences on which the court below relied to support its holding (Petition pp. 24-25). It is true that consideration by the court below of the alleged facts of which it took judicial notice followed a summarization of the evidence on which the trial judge based his verdict. But up to that point all that the summarization reveals is the basis on which Judge Noonan predicated his finding of knowledge of the *prospective issuance of the order.*

Respondent asserts that the court below "did no more than to note judicially a further fact, not considered by the trial judge so far as appears, which made his factual finding from the adduced evidence more probable" (Brief p. 15). But this "fact" did not make the trial judge's finding more probable. It substituted a new finding and changed the nature of the finding from that which could not support the conviction to one which presumably could.*

Respondent does not point to any precedent for consideration by an appellate court of material facts *de hors* the record to support a finding of the sufficiency of the evidence in a criminal case. *Mills* v. *Denver Tramway Corporation*, 155 F. 2d 808, 812 (C. A. 10) cited by respondent (Brief p. 15) involves a civil proceeding.

We respectfully submit that this case brings up for review important questions of federal law which have not been but should be decided by this Court.

Respectfully submitted,

MARY M. KAUFMAN,
Attorney for Petitioner.

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* Respondent does not address itself to our contentions that the daily papers did not carry news of the order and its violation and that the alleged facts which the court below judicially noticed were not the proper subject of judicial notice (Petition pp. 22-24). Nor does it address itself to our contention that the court below improperly imputed knowledge to petitioner of the alleged contents of the daily papers (Petition pp. 24-26).